Office - Supreme Court, U.S.
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DEC 8 1982
ALEXANDER L. STEVAS,
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NO. 65, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

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STATE OF TEXAS,

Plaintiff

V.

STATE OF NEW MEXICO,

Defendant

UNITED STATES OF AMERICA,

Intervenor

TEXAS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

• • •

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

R. LAMBETH TOWNSEND
Assistant Attorney General
Environmental Protection
Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4143

*Attorneys for Plaintiffs,
State of Texas*

Of Counsel:

FRANK R. BOOTH
Booth, Lloyd & Simmons
302 San Jacinto Building
Austin, Texas 78701
(512) 478-9506

*Attorneys for Red Bluff
Water Power Control District*

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No. 65, Original

IN THE
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OCTOBER TERM, 1982

STATE OF TEXAS, *Plaintiff*

V.

STATE OF NEW MEXICO, *Defendent*

UNITED STATES OF AMERICA, *Intervenor*

EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

Comes now the State of Texas to accept the Special Master's recommendations that the United States representative on the Pecos River Commission be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree, that the Pecos River Commission should then perform its duties, and that the Court retain jurisdiction of the case. However, if the Court decides not to accept these recommendations of the Special Master, Texas excepts to the report of the Special Master accepted for filing on October 18, 1982, as follows:

1. Texas objects to the Master's conclusion that the continuation of the suit is beyond the judicial function.

2. Texas objects to the Master's conclusion that the Texas motion to substitute double mass analysis for river routing should be denied.

WHEREFORE, the State of Texas prays that the Court accept the Special Master's recommendation that the United States representative on the Pecos River Commission be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree, that having vested the United States representative with the power to vote to resolve any impasse, the States be ordered to return to the Pecos River Commission for performance by it of its duties, and that the Court retain jurisdiction of the case. In the alternative, if the Court does not accept the above-mentioned recommendations, the State of Texas prays that the Court grant the Texas motion to substitute the double mass analysis for the river routing and remand the case with instructions to make the necessary determinations to conclude the law suit.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

R. LAMBETH TOWNSEND
SBN 20167500
Assistant Attorney General
Environmental Protection
Division

P.O. Box 12548
Austin, Texas 78711
(512) 475-4143

Attorneys for Plaintiff
State of Texas

Of Counsel:

FRANK R. BOOTH
Booth, Lloyd & Simmons

Attorneys for Red Bluff
Water Power Control District

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OCTOBER TERM, 1982

STATE OF TEXAS, *Plaintiff*

V.

STATE OF NEW MEXICO, *Defendant*

UNITED STATES OF AMERICA, *Intervenor*

BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

The alternative exceptions of the State of Texas will address the following questions:

1. Whether the continuation of the lawsuit is within the judicial functions.

2. Whether the double mass analysis should be substituted for river routing as the inflow-outflow method to determine the base relationship depicting the 1947 condition.

JURISDICTION

The original jurisdiction of the Court was invoked under Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. §1251(a)(1).

PECOS RIVER COMPACT

The rights of Texas and New Mexico equitably dividing and apportioning the waters of the Pecos River, an interstate river which rises in North Central New Mexico and flows in a southerly direction through New Mexico and Texas, are set forth in the Pecos River Compact of 1948, ratified and approved by Act of Congress, Senate Document 109, 81st Congress, 1st Session 1949, 63 Stat. 159 (1949). A copy of the Compact is appended as Appendix A.

STATEMENT OF THE CASE

The Special Master's report fairly states the nature of the case and the facts that are material to the consideration of the questions presented. There are a few matters that Texas believes need further discussion, however.

In the History of Litigation section of the Report at p. 10, the Master correctly states that Texas submitted the report of Drs. Charnes and Heaney which recommended the use of the double mass analysis to determine the base relationship for the 1947 condition. Master's Exhibit 20(b). Texas did not state its position concerning the ¶4(b) issues, which related to the river routing method, because the double mass analysis is an inflow-outflow method which is not as dependent on an individual's judgment as is the river routing method. The Texas submission was in response to the Master's statements that some other method of accounting under the Compact should be considered. See Tr. vol. XXXIII, pp. 3277-3280.

In the Factual Issues section of the Report at p. 13, the Master discusses the "water budget" method which is used in river routing for computation of unmeasured values. The Master correctly states that the results may be a "residual negative, i.e., a minus flow which is

impossible of occurrence in a state of nature." However, during the March 8-16 hearing, Texas clearly stated its position that when a residual negative occurs in a flood inflow computation, it should be set at zero unless the residual negative is caused by lag time[1] in which case the minus number should be carried forward. See Texas Exhibit 62 and Texas Exhibit 48 at pp. 3, 5, 22 and 31, Tr. vols. XLI, pp. 3975-3976, and XLII, pp. 4151-4152.

Texas disagrees with the Master's statement at p. 20 of the Report that "Texas and New Mexico say that if the case is to proceed, the next step should be the determination of the ¶4(b) issues." New Mexico has said that the ¶4(b) issues should be determined. However, Texas did not object to the Master's order of December 29, 1981, vacating the ¶4(b) portion of the 1977 Pre-Trial Order. Texas says that if the case proceeds, the next step is to determine the base relationship depicting the 1947 condition and that the double mass analysis method, Texas Exhibit 41, should be used. In the event the double mass analysis method is not used, Texas has proposed a river routing method to be used. Texas Exhibit 48. New Mexico responded to Texas' river routing proposal in its Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows. New Mexico Exhibit 54. New Mexico substantially agrees to the Texas proposal, but disagreements between the states still remain in certain areas. See New Mexico Exhibit 54, pp. 8-14 and Tr. vol. XLII, pp. 4194-4243. These disputes need to be resolved by the Court in order to depict the 1947 condition by river routing.

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[1]Lag time is the fact that releases, irrigation returns, or flood inflows are in transit between an upstream and downstream gage when the gage flows are recorded and used in the computations. See Tr. vol. XLII, pp. 4145-4146.

SUMMARY OF ARGUMENT

The Pecos River Commission is not a federal agency. Since the Commission is not a federal agency, the Court is not limited to the scope of review provisions of 5 U.S.C. §706. The Compact creates federal rights in the compacting States. In this action, Texas is seeking enforcement of her rights under the Compact. Enforcement of these rights is a judicial function.

It is within the Court's jurisdiction to construe the Compact, to determine whether there has been a breach of the Compact obligation, and to issue a judgment to remedy any breach regardless of Commission action or inaction. Commission determinations and findings under Arts. V and VI are not conclusive in any court but are prima facie evidence of the facts found which may be rebutted or contradicted. In the absence of Commission action, the Court is deprived of prima facie evidence. The Court may exercise its independent judgment in resolving the disputes without invading the discretion of the Commission.

The Court's decree would not be advisory. Rather, the Court can render an effective decree by ordering the States to conduct their activities in accordance with the Court's construction of the Compact and to remedy any breach that is found. Such a decree would be binding on the States and their representatives on the Pecos River Commission.

The Court has partially construed the Compact by defining the 1947 condition. It is within the Court's power to use the double mass analysis method to define the 1947 condition quantitatively since it is an inflow-outflow method.

ARGUMENT

1. Continuation of the Suit

The Master has concluded that "further progress in this case will require him, and the Court, to perform administrative duties and exercise administrative powers delegated to the agency created by the Compact" and that "such exercise of administrative power is beyond the judicial function." Master's 1982 Report, p. 27. Texas excepts to this conclusion. It is clearly within the Court's power and is clearly a judicial function to construe interstate compacts consented to by Congress. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

In this suit to enforce the Pecos River Compact, Texas is asking the Court to determine whether New Mexico has been making deliveries of water at the New Mexico-Texas state line in accordance with her Compact obligation. Because the Compact creates an interstate administrative agency, the Pecos River Commission, and delegates to the Commission the power to make findings concerning state line deliveries, changes in depletion by man's activities in New Mexico, and quantities of water non-beneficially consumed in New Mexico, Art. V(a) and (d), the Master believes that the Court cannot make similar findings in the absence of Commission finding in this suit to enforce the Compact. Texas believes the contrary.

Texas agrees with the Master's conclusions, and his reasons therefor, that the Commission is not a federal agency. Master's 1982 Report, p. 17. Since the Commission is not a federal agency, the judiciary, and this Court specifically, is not limited by 5 U.S.C. §706 and the cases construing it. Since 5 U.S.C. §706 is not applicable, we must look to the Compact to see what the scope of review is and what limits, if any, are imposed on the judiciary. Art. V(f) states that "[f]indings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found." Commission findings, if any, constitute prima facie evidence

and as such, can be contradicted or rebutted. Further, the Compact in no way makes the fact-finding power of the Commission exclusive. Implicit in Art. V(f) is the understanding of the parties to the Compact that the Court will enforce the Compact.

The Compact has created federal rights in the compacting states since the Compact is "a law of the United States," *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). Texas is seeking enforcement of her rights under the Compact in this action. Enforcement of these rights is a judicial function, even though in this action such enforcement requires the Court to resolve factual and policy disputes delegated to, but unresolved by, the Commission. Judicial inaction would preclude the only effective remedy Texas has to protect her rights under the Compact. Commission action should not be a prerequisite to judicial relief. If that were the case, Commission inaction would prevent the Court from exercising its jurisdiction to protect federal rights under the Compact. *See Green v. Biddle*, 8 Wheat (21 U.S.) 1, 90-91 (1823) and *British Airways Board v. Port of Authority of New York and New Jersey*, 564 F.2d 1002, 1010 (2d Cir. 1977).

In *Green v. Biddle, supra*, this Court construed a compact between Virginia and Kentucky which provided for the creation of a special tribunal for the resolution of disputes about the interpretation and execution of the compact. It was argued that the Court has no jurisdiction to construe the compact because the compact had created a tribunal to do so. In reply to this argument the Court said:

> How, then, are those controversies ... to be settled? The answer, we presume, would be, by Commissioners, to be appointed by those States. But none such have been appointed; what then? Suppose either of

> those States, Virginia for example, should refuse to appoint Commissioners? Are the occupants of lands, to which they have no title, to retain their possessions until this tribunal is appointed, and to enrich themselves, in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.

Id. at 90-91. Such would be the result in this case if the Court does not have the jurisdiction to enforce the Compact by resolving the remaining disputes between the States through continuation of the suit.

In his report, the Master concluded that continuation of the suit is not within the judicial function because it would require the Court to perform administrative duties and exercise administrative powers delegated to the Commission. The Master cites *Federal Radio Commission v. General Electric Company,* 281 U.S. 464, 469 (1930), for the proposition that the Court cannot "exercise or participate in the exercise of function which are essentially ... administrative" and cites *Federal Communications Commission v. Schrieber,* 381 U.S. 279, 290-291 (1965) for the proposition that the Court cannot establish administrative procedures *de novo.* Both cases are inapplicable to the present controversy.

This court has held repeatedly that the Constitution forbids Article III courts from exercising administrative functions, but it has never clearly defined the difference between judicial and administrative functions. *Federal Radio Commission v. General Electric Company, supra,* involved facts which today might be held to present a judicial question. *Federal Communica-*

tions Commission v. Schrieber, supra, stands for the principle that agencies must be allowed to create their own rules of procedure with as little judicial interference as possible. Texas does not dispute this conclusion, but finds it inapposite here.

Federal Radio involved the Federal Radio Act, which instructed the District of Columbia Court of Appeals to review the decision of the Federal Radio Commission by taking additional evidence and making such order as might seem just. This Court held that such a review was an administrative function. It was permissible for the Court of Appeals to sit as a superior administrative agency since the Court of Appeals was a legislative court. The Court held that the Supreme Court could not review the Court of Appeals decision because Article III of the Constitution prevents it from performing administrative functions. However, *Federal Radio* neither provides a rule to distinguish administrative from judicial functions nor does it stand for the proposition that courts may not be instructed to redo completely the work of an administrative agency. *See,* Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction §3535.

This suit is not seeking review of agency action or procedures, rather it is seeking enforcement of Compact obligations. The Compact contemplates judicial enforcement of the Compact. Art. V(f). Admittedly, there has been no action by the Pecos River Commission concerning Compact obligations since 1961, but Commission findings are only prima facie evidence of the facts found. Art. V(f). This suit is more analogous to the situation in *United States v. First City National Bank of Houston,* 386 U.S. 361 (1967) where the Court held that the findings of the Comptroller of the Currency under the Bank Merger Act of 1966 were not binding on the Court in an antitrust action under the Clayton Act. The Bank Merger Act permitted the comptroller to approve a merger which would lessen competition if he found

that the anti-competitive effects of the proposed merger were outweighed by the probable effect of the transaction in meeting the convenience and need of the community. The comptroller had made such finding and approved the merger. The Bank Merger Act provided that in a judicial proceeding attacking a merger on the grounds that it violated the antitrust laws, a court would apply the same standards as the banking agency would and further, that the court would review *de novo* the issues presented. *Id.* at 363-365.

The Court saw the problem presented as one of determining whether the comptroller's decision was one in the category of other administrative rulings which are sustained unless the agency's action is not supported by substantial evidence. *Id.* at 366-367. The Court found that it was not because the statutory language does not express the conventional standard, the comptroller's action was informal, i.e., no hearings, and the court's judgment finally determines whether the merger is legal. *Id.* at 368-369. The rule of the *First City National Bank* case is that the Court may apply the same standards and make similar findings that an administrative agency makes when the Court is making a judicial determination and when the statute does not make the agency findings conclusive unless unsupported by substantial evidence.

In this case, the Compact does not express any intent that the findings of the Commission should be upheld unless they are not supported by substantial evidence. The Compact does not provide for any formal adjudicatory hearing procedure. The commission is not vested with any enforcement powers. The Compact contemplates that any enforcement of the Compact will be by the courts. Art. V(f). Compact construction, interpretation, and enforcement are within the jurisdiction of this Court. *West Virginia ex rel. Dyer v. Sims, supra.* For these reasons, the Compact's grant of fact-

finding power to the Commission does not preclude the Court from making similar determinations in a suit to enforce Compact obligations.

In the absence of a clear dividing line between administrativie and judicial functions, the Court must decide on policy grounds which cases present questions that are appropriately settled by courts. Texas submits that the present dispute is especially well suited for resolution by the Court. This case presents questions of the construction of a compact. Construction of a compact is a familiar judicial function. It is true that these proceedings involve complex matters of fact. So do other types of cases for which this Court has shouldered the duty to decide, e.g., equitable apportionment of streams, antitrust litigation, or the oversight of the drawing of legislative districts. But without recourse to this Court, Texas and New Mexico have no forum to decide this dispute.

The other problem that the Master expressed concerning the continuation of the law suit is the Court's decree. The Master believes that any decree of the Court resolving the dispute could be subverted by Commission action or the one-state veto which would make the Court's decree advisory. Master's 1982 Report, pp. 21-22. Texas disagrees with the Master's conclusion. Article III of the United States Constitution provides that the judicial power of the United States extends to controversies between two or more states and gives the Supreme Court original jurisdiction of cases between states. The Court has the power to determine the nature and scope of compact obligations as between states, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 28. The jurisdiction of actions between states includes the power to enforce any judgment that may be entered. The Court may fashion appropriate remedies, even though their exertion may operate upon governmental powers of the state. *Virginia v. West Virginia*, 246 U.S. 565 (1918). The Court has announced

its power to enforce its judgments, but it has trusted the states to comply with their constitutional duty to act in accordance with its judgments. *Id.; Wyoming v. Colorado,* 309 U.S. 572 (1940).

The Court's judgment will be binding on the States and their representatives. The Court's construction of the Compact would be the law of the land until Congressional action to the contrary. We presume that the States will abide by the judgment in good faith. The Commission would be required to exercise its duties in accordance with the Court's construction of the Compact at a matter of law. There is no reason to believe that the Commission will not abide by the Court's construction.

The Commission would be able to exercise its other powers and duties. Art. V. One-state veto could not be used to subvert yearly accounting because the Court's decree would be controlling until the Commission could agree to other methods or to an alternative to the inflow-outflow method. Art. VI(c). The decree would insure action whenever the Commission is deadlocked.

2. Denial of the Texas Motion to Substitute Double Mass Analysis for River Routing

In order to determine whether New Mexico has met her Compact obligation, Art. III(a), the Court needs to implement the Master's definition of the 1947 condition, which was affirmed by the Court. 446 U.S. 540. As the Master said, "The legal definition must be translated into water quantities to provide a numerical standard for measurement of compliance." Master's 1982 Report, p. 1. The 1947 condition river routing study contained in the Report of the Engineering Advisory Committee, S.D. 109, cannot be used because it contains errors. Master's 1979 Report, p. 41. Texas has proposed the use of the double mass analysis method to

translate the water quantities into a numerical standard. *See,* Texas' Motion to Use the Double Mass Inflow-Outflow Method and Texas Exhibit 41.

The Master has repeatedly expressed his concern about the use of a river operation or river routing study to determine the base inflow because such a study requires many engineering judgments which can result in good faith differences of opinion. Tr. vols. XXXIII, pp. 3270 and 3277-3280, and XXXIV, pp. 3299-3301. In response to the Master's concerns, Texas urges the use of the double mass analysis to quantitatively define the 1947 condition because it is accurate and eliminates the computation of unmeasured values and the utilization of judgment dependent techniques which are necessary in the river routing methold. *See* Texas Exhibit 41, pp. 1-5. During the March 8-16, 1982, hearings, Texas presented the testimony of Drs. Heaney and Charnes to explain the Texas double mass analysis proposal and New Mexico offered rebuttal testimony. *See* Tr. vols. XXXVIII, XXXIX, and XL, pp. 3808-3940. After hearing this testimony, the Master has concluded that the double mass analysis is an "accounting procedure usable in the administration of the inflow-outflow method." Master's 1982 Report, p. 14. However, because the engineering advisors to the Compact negotiators were concerned about the use of an allocation of water on a straight-line percentage basis, the Master has denied Texas' motion to substitute double mass analysis for river routing. Master's 1982 Report, p. 21.

The Master quotes the following from the Report of Engineering Advisory Committee, S.D. 109, pp. XXXIII-XXXIV:

> A compact based on an *allocation* of water on a straight-line percentage is not feasible or practical. The flow of water at any point in a given stream, under natural condi-

> tions, does not bear a straight-line relation to the inflow to the stream above that point. (Emphasis added)

In determining the base relationship, two questions need to be addressed. First, what proportion of the Pecos River flow is Texas entitled to under the 1947 level of development? This relates to the obligation. Second, what are the annual delivery requirements of New Mexico to Texas? This relates to allocation.

The first question concerns the long-term compact obligation under a wide variety of hydrologic conditions that could be expected during the next 50 to 100 years. The double mass analysis addresses this question. The results of the study indicates that Texas is entitled, on the average to 1.22 times the flow at Alamagordo (Sumner) gage. Texas Exhibit 41, pp. 27-34 and Fig. 17. In other words, this calculation establishes the long-term obligation to provide water. For example and for illustrative purposes, the compact obligation could require New Mexico to deliver an average of 100,000 acre feet per year for the next 50 years or a total obligation of 5,000,000 acre feet over this 50 year period.

Given the answer to the first question, using the example, we know that New Mexico must average 100,000 acre feet per year. The second question, which concerns allocation, is analogous to financial analysis in that we are trying to find a mutually agreeable payment plan. The simple payment plan is that New Mexico provides 100,000 acre feet per year. However, as the engineers correctly point out in the same section from which the above quote is taken, the inflow-outflow relation is an exponential one. Report of Engineering Advisory Committee, S.D. 109, p. XXXIV. Therefore, a uniform delivery requirement may cause a hardship on the upstream state because it would force the state to

construct reservoirs to satisfy the delivery schedule. Consequently, it would be preferable to vary the annual delivery requirement based on the observed flow, i.e., low delivery in low flow years and high delivery in high flow years. This is precisely what Texas is suggesting by introducing the curve into the relationship. *See* Texas Exhibit 41, pp. 36-42 and Fig. 19. Texas has addressed the concerns of the engineer advisors and proposes an allocation based on a curvilinear basis rather than a straight-line percentage. Whatever the answer to the second question is, it does not affect the answer to the first question. The Master does not separate these questions. Consequently, the Master criticizes the double mass analysis incorrectly.

If the Court affirms the Master's conclusion that the double mass analysis is an accounting procedure which can be used in the inflow-outflow method, there is no question that the Court can substitute the double mass analysis for river routing. The Court has affirmed the Master's conclusion in his 1979 Report that "neither the 1947 routing study nor any other portion of the various engineering reports, appendices, and supplements" can be used to determine the depletion of the stream by New Mexico. Master's 1979 Report, p. 41; 446 U.S. 540.

These reports, appendices, and supplements are nullities for the purposes of determining the 1947 condition base relationship under the inflow-outflow method. This void can be filled by the Court's utilization of the double mass analysis to depict the 1947 condition base relationship. The double mass analysis is accurate and eliminates the computation of the many unmeasured values and the selection of techniques that is required by river routing. The engineering judgments associated with these computations and selections have caused the dispute between the States and their disagreement has resulted in this lawsuit. The double mass analysis is not a cure-all but is a major step

in the elimination of potential areas of dispute. For these reasons, Texas urges the Court overrule the Master's denial of the Texas motion to substitute the double mass analysis for river routing.

CONCLUSION

For the reasons stated above, the State of Texas respectfully disagrees with the Master's conclusions that continuation of the suit is not within the judicial function and that the Texas motion to substitute the double mass analysis for river routing should be denied. This is a suit to enforce the Compact, not to review Commission findings. It is clearly within the jurisdiction of the Court to enforce the Compact even if it requires the Court to make findings which would ordinarily be made by the Commission and as such would be prima facie evidence in any court. The Court's decree would be binding on the parties and their representatives, including the Compact Commissioners.

Use of the double mass analysis is authorized by the Compact as it is a means of accounting under the inflow-outflow method. Double mass analysis should be used to depict the 1947 condition because it is accurate and eliminates judgment dependent computations and decisions which are necessary in the river routing method.

In the event the Court does not accept the Master's recommendations concerning the U.S. Commissioner's power to vote in Commission deliberations, Texas respectfully requests that the Court remand the case to the Special Master for continuation of the lawsuit with instructions to use the double mass analysis, as proposed by Texas, to depict the 1947 condition.

Respectfully submitted,

Of Counsel:

Frank R. Booth
Booth, Lloyd & Simmons

Attorneys for Red Bluff
Water Power Control District

MARK WHITE
Attorney General of Texas

R. LAMBETH TOWNSEND
Assistant Attorney General
Environmental Protection
Division

P.O. Box 12548
Austin, Texas 78711
(512) 475-4143

CERTIFICATE OF SERVICE

I, R. Lambeth Townsend, attorney for the State of Texas, plaintiff herein, and a member of the bar of the United States Supreme Court, certify that on this the ____ day of _____, 1982, I served copies of the foregoing by U.S. mail, postage prepaid, to counsel for New Mexico and the United States.

_____

R. Lambeth Townsend
Assistant Attorney General

APPENDIX A

PECOS RIVER COMPACT
(63 Stat. 159, 160-165)

The State of New Mexico and the State of Texas, acting through their Commissioners, John H. Bliss for the State of New Mexico and Charles H. Miller for the State of Texas, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.